IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 617

DISTRICT OF COLUMBIA, *Petitioner*,

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*.

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF THE WASHINGTON BOARD OF TRADE AS AMICUS CURIAE

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As to these matters, this Petitioner concurs with and adopts the presentation thereon set forth in the Brief herein on behalf of the Respondent.

SUMMARY OF ARGUMENT

Petitioner, the Washington Board of Trade, contends (a) that the enactments of the Legislative Assembly of the District of Columbia of 1872 and 1873,[1] which are here in

[1] Quoted in Appendix A to Brief herein for the District of Columbia.

question, were beyond the power of that legislative body to enact, being beyond the scope of municipal regulation and not founded upon amendment to the Constitution of the United States which hence was necessary; (b) moreover, that in any event they were repealed by omission in the establishment of a Code of Law for the District of Columbia by the Act of Congress of March 3, 1901, signed by the President of the United States and finally, (c) that, in any event, these enactments were, through non-user for three quarters of a century, repealed by abandonment.

INTEREST OF WASHINGTON BOARD OF TRADE AS AMICUS CURIAE

The Washington Board of Trade is an incorporated non-profit civic association founded in 1889 by Washington businessmen. Its purpose, as expressed in the corporate by-laws, is to consider and act upon matters pertaining to the welfare of the national capital. The Board of Trade's roster of more than 5500 members includes corporations, firms, and individuals representing a comprehensive cross-section of the businesses and professions in the District of Columbia, including among others, banking, retail and wholesale merchandising, service industries, public utilities, newspapers, universities and colleges, and restaurants.

The Board of Trade is concerned in the instant appeal because it raises a question, the determination of which may result in material impairment of the status of the District of Columbia under the Constitution of the United States. Consistently, the Board of Trade has maintained that under the Constitution The Congress cannot delegate its authority to legislate for the District notwithstanding our great desire as citizens of the District of Columbia to have representation in The Congress and participate in the formulation and enactment of the laws under which we live. We want these laws to be created in accordance with the Constitution. For this reason the Board revolts at the use of long-neglected acts of the Legislative Assembly

which existed only from 1871 to 1874 in defining and deciding directly the constitutional status of the District. Until such status has been concretely defined, either by decision of this Court or by amendment of the Constitution, Congress cannot, and will not, grant to the people of the District the privilege of participation in self-government on a national and local level.

The Board of Trade is further opposed to the attempted enforcement of "lost" acts of legislative bodies as repugnant to American standards of fairness. Such practice cannot but impose burdens of unknown magnitude on all Washington business as well as disrupt orderly business planning.

STATEMENT OF THE CASE

On August 1, 1950, the John R. Thompson Co., Inc., a restaurant company, was charged through an information filed by the Corporation Counsel for the District of Columbia with having refused service to certain well-behaved and respectable persons in violation of enactments of 1872 and 1873 of the Legislative Assembly of the District of Columbia regulating restaurants and other eating places in the District. (R. 1-3) The Municipal Court for the District quashed the information, holding that both enactments were repealed by the Organic Act of 1878. The Municipal Court of Appeals for the District affirmed the order of the Municipal Court so far as it related to the enactment of 1872, and reversed the lower court's decision so far as it related to the enactment of 1873 on the ground that said enactment was valid when enacted and was never repealed. Cross-appeals were then taken to the United States Court of Appeals for the District of Columbia Circuit. The Chief Judge and three other judges affirmed the decision of the Municipal Court of Appeals with reference to the enactment of 1872 and reversed said court as to the enactment of 1873, holding that said enactment was not within the power of the Legislative Assembly and that both enactments were repealed by

the District of Columbia Code of 1901, the fifth judge being of the view that even if these Acts were within the power of the Assembly to enact, long disuse thereof had repealed them by implication. Certiorari was granted by this Court on April 6, 1953.

I.

THE ENACTMENTS OF 1872 AND 1873 WERE NOT WITHIN THE POWER OF THE LEGISLATIVE ASSEMBLY

The Constitution in Article I, Section 8, Clause 17 empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . ."

The Act of Congress of February 21, 1871 creating the Legislative Assembly for the District of Columbia provided in Section 1:

> That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.

In Section 5 the Act provided, inter alia:

> That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided.

In Section 18 the Act provided:

> That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, never-

> theless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

The Supreme Court of the United States in the case of *Stoutenburgh* v. *Hennick*, 129 U. S. 141, decided in January 1889, questioned the power of the Legislative Assembly. The Assembly by an Act of August 23, 1871, amended June 20, 1872, had prohibited "commercial agents" to engage in their business in the District of Columbia without first obtaining a license to do so. An agent of Baltimore, Maryland was convicted in the District of violation of that enactment and sentenced to pay a fine, or in default of payment thereof, to serve a term in the workhouse. In a habeas corpus proceeding he attacked the validity of the enactment on the ground that, as applied to persons soliciting sales of goods in the District on behalf of concerns outside the District, it was a regulation of interstate commerce and hence within the exclusive power of Congress. Chief Justice Fuller, speaking for the Court, said:

> It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.
>
> Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of

> Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do. (129 U. S. at page 147).

The Court further said that while it regarded the Act of the Assembly as a purely municipal regulation, it was not such when applied to the defendant because the Act regulated interstate commerce; and was, therefore, void. The concluding language of the Court was as follows:

> In our judgment Congress, for the reasons given, could not have delegated the power to enact the 3d clause of the 21st section of the act of assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely .... (129 U. S. at Page 149).

The Supreme Court in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 1 (1889) held that the District of Columbia was not a sovereign but was a municipal body and that its supreme legislative body was Congress.

In *Roach* v. *Van Riswick*, MacArthur and Mackey's Reports, 171, (1879), there was presented to the Supreme Court of the District of Columbia, a case involving the validity of an act of the Legislative Assembly of the District of Columbia of August 2, 1871, which provided that judgments rendered in the District shall be a lien on equitable interests in real estate. This legislation had no relation to municipal powers but was of a type of general legislation not customarily delegated by a state legislature to a municipality. The Court held that the Congress could not delegate to the District Legislative Assembly author-

ity to enact such a law. Among other things the Court said at page 172:

> There has been an instinctive reluctance on the part of bench and bar, to recognize the legislation of the late government of the District as valid, so far as it transcended the limits of strictly municipal action. This sentiment has hardly shaped itself into a definite opinion or formulated the reasons for its existence. It has sometimes sought its excuse in the want of positive confirmation by Congress of the legislation in question. This, however, is a very unsatisfactory foundation for it. The organic act, as it is called, i.e., the act of February 21, 1871, which establishes the District government, nowhere contains an intimation that the acts of the new government are to be inoperative until or unless confirmed by Congress; but, on the contrary, by the strongest implication, excludes such idea. The 50th section declares that all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States. Until repealed or modified, the clear implication is that they are to operate, *proprio vigore*. If Congress had first to approve, it is obvious that its judgment as to the rightfulness or expedience of measures submitted to them would be exercised then, and it was unnecessary to reserve it expressly, or the occasion when legislation once in force, is to be reviewed in order to modify or annul it. It is plain to us that as far as Congress could confer the power of original and independent legislation, needing no confirmation, but complete and operative in itself, it has done so by the Act in question. The unwillingness so generally felt to give effect to this legislation grows partly out of a lurking doubt which existed from the beginning and has never been dispelled, as to the constitutional power of Congress to create such an anomalous entity as the late District government, and to invest it with the powers which the act of 1871 purports to convey.

Speaking of the word "exclusive" in article I, section 8, of the Constitution, the Court said:

> It may be admitted that the term "exclusive" has reference to the States and simply imports their exclu-

> sion from legislative control of the District, and does not necessarily exclude the idea of legislation by some authority subordinate to that of Congress and created by it.

The Court went on to hold that under the general principles, Congress had no right to delegate to the District Assembly power to legislate over anything but local municipal affairs:

> Our conclusion, on the whole, is, that the act of the District legislature declaring judgments rendered by this court to be liens on equitable interests in land, was an act of legislation which it was only competent for the Congress of the United States to pass, and was in itself totally inoperative and void, and the decree rendered by the Court below must be reversed. (MacArthur and Mackey's Reports at page 187)

In *Cooper* v. *The District of Columbia*, 11 District of Columbia Reports (MacArthur and Mackey) 250, decided May 18, 1880, the Court considered an ordinance of the Legislative Assembly of the District passed August 23, 1871, providing for the licensing of produce dealers within the limits of the District. The Court sustained the Act of the Legislative Assembly on the ground that the licensing of produce dealers was a municipal matter in respect of which Congress had power to delegate legislative authority to the District government, and the Court distinguished the decision in *Roach* v. *Van Riswick* on that ground.

In *Smith* v. *Olcott*, 19 App. D. C. 61 (1901), the Court of Appeals of the District of Columbia held invalid so much of section 21 of an act of the Legislative Assembly of the District of August 23, 1871, as fixed the rate of charges by auctioneers for selling real estate on the ground of its being an attempt to exercise a general legislative power over the freedom of contracts, which it was not within the power of Congress to delegate. The Court said:

> Congress has express power 'to exercise exclusive legislation in all cases whatsoever,' over the District of Co-

lumbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes,' could only authorize it to exercise municipal powers.

The Court also said:

> It is not a mere local regulation within the scope of the powers ordinarily delegated to municipal corporations, but an attempt at the exercise of a general legislative power over the freedom of contracts.
>
> It is essentially different from the power exercised in other parts of the Act in the matter of regulating the occupation of auctioneers, and laying a license tax upon the same.
>
> It also differs from those enactments, frequently made by municipal bodies under special delegations of power, which regulate the charges, by fixing a maximum rate, of all persons engaged in certain particular callings, as for example, hackmen who make special use of the public streets and places in the pursuit of their regular calling.
>
> It will be observed that the regulation in question does not undertake to fix a maximum rate of charges for auctioneers, leaving parties free to contract for less if they see proper, but undertakes to prescribe one absolute, invariable charge for all sales of real estate. In this respect it resembles an act prescribing the fees of public officers, for official services compulsorily rendered, and which, as a matter of sound public policy, are not permitted to become the subject of special contract. (19 App. D.C. at page 75)

Another decision by the Court of Appeals of the District of Columbia which is pertinent was rendered in the case of *Coughlin* v. *District of Columbia*, 25 App. D. C. 251 (1905). Congress had passed a joint Resolution on February 26, 1892, 27 Stat. 394, empowering the Commissioners of the

District "to make and enforce all such reasonable and usual police regulations in addition to those already made under the Act of January twenty-sixth, eighteen hundred and eighty-seven, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia * * *." Pursuant to that Resolution the Commissioners passed and promulgated a regulation requiring the owners or occupants of buildings or land fronting upon a paved sidewalk in the District to remove snow and ice therefrom. The Court said:

> . . . it is regulation, not legislation, that is authorized; the reasonable regulation of the exercise of right, not the imposition of a duty; the usual police regulation for the maintenance of public order, not the levying of a tax either in the way of enforced labor or in the way of purchase of materials for sprinkling the sidewalks. Whatever power the legislature itself may have in the premises, certainly it is not to be presumed to have granted such plenary authority as is here claimed under the joint resolution of 1892.
>
> That various municipalities may have exercised such power, as appears from various municipal ordinances collated in the brief on behalf of the appellee, is not to the point. Municipalities are usually vested with quasi legislative powers, among them the sovereign power of taxation and assessment, and from the fact that municipal ordinances are elsewhere to be found, analogous to the so-called regulation here in question, it is not to be inferred that similar powers exist in the commissioners of the District of Columbia. The commissioners are not the municipality, but only the executive organs of it; and Congress has reserved to itself, not only the power of legislation in the strict sense of the term, which it cannot constitutionally delegate to anyone or to any body of men; but even the power of enacting municipal ordinances, such as are within the ordinary scope of the authority of incorporated municipalities. It has delegated to the commissioners simply the power of making "police regulations," and only

> such police regulations as are usual and commonly known by that designation. (25 App. D. C. at pages 254-255)

The Court held the regulation invalid and rested its decision in part upon the ground that the Congress on three occasions had expressly legislated on the same subject. The Court said those Acts by Congress were sufficient to show that it had reserved this subject for itself and did not confer upon the Commissioners the power to regulate it.

The regulation was stated to be copied from an old municipal ordinance of the City of Washington and the Court said:

> . . . Instead of an application to Congress there has been this ill-advised resurrection of an old municipal ordinance, and the promulgation of it by the commissioners as a regulation of their own, intended to effect what three several acts of Congress had failed to effect. We cannot but regard it as a plain usurpation of the powers of Congress. (25 App. D. C. at page 257)

In *United States ex rel. Daly* v. *MacFarland*, 28 App. D. C. 552 (1907), it appeared that under an Act of April 23, 1892, 27 Stat. 21, and an Act of March 3, 1893, 27 Stat. 537, the Congress had extended to the Commissioners of the District power to make plumbing regulations, and had provided that violation of such regulations should be punishable by fine or, in default of payment thereof, by imprisonment. The Commissioners promulgated regulations, but included therein an additional penalty for violation, to wit, the revocation of a plumber's license. Acting under the regulations thus promulgated, the Commissioners forfeited a license. In a mandamus proceeding to compel restoration of the same, this court held that it was not within the power of the Commissioners to provide the additional penalty. The court said:

> It is well settled that the District of Columbia has no legislative power, it being merely a municipal corpora-

tion bearing the same relation to Congress that a city does to the legislature of the State in which it is incorporated. (Citing authorities)

The next proposition is equally established, namely, that '*a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' Dill. Mun. Corp. 4th ed. Sec. 89.[1]

* * * *

. . . The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling, and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear, or it must be held not to exist. Judge Dillon says (sec. 345):

> 'A corporation, under a general power to make by-laws, cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly* conferred by the legislature.'

Certainly such power will not be presumed to exist in statutes in restraint of the ordinary and legitimate avocations of life, avocations in which the mass of human toilers gain their livelihood and contribute to

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[1] Judge Dillon in support of the text cites numerous cases. To these may be added: *Greater New York Athletic Club* v. *Wurster*, 19 Misc. 443, 43 N. Y. Supp. 705; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 720; *Coughlin* v. *District of Columbia*, 25 App. D. C. 251. See also 21 Am. & Eng. Enc. Law, 2d ed. p. 948.

the welfare and happiness of society. In *Greater New York Athletic Club* v. *Wurster*, *supra*, the court held that a grant of power to abridge and curtail the exercise of the right of the individual to engage in or pursue a business or calling lawful in itself can only be justified and sustained on the theory that the exercise of such power is necessary to the public welfare and safety, and such power cannot be presumed, but must be clearly expressed. (28 App. D. C. at pages 558-562)

Johnson v. *District of Columbia*, 30 Appeals D. C. 520 (1908), was a decision by the Court of Appeals of the District of Columbia in which it held that an act of the Legislative Assembly of August 23, 1871, which prescribed a jail penalty or fine or both for cruelty to animals was a mere police regulation. The Court said:

> We think it clear that the two sections of the Act above referred to . . . are mere police regulation, and therefore within the scope of powers delegated to the municipality by Congress. *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Smith* v. *Olcott*, 19 App. D. C. 61. Cruel treatment of helpless animals at once arouses the sympathy and indignation of every person possessed of human instincts,—sympathy for the helpless creature abused, and indignation towards the perpetrator of the act; and in a city, where such treatment would be witnessed by many, legislation like that in question is in the interest of peace and order and conduces to the morals and general welfare of the community. 'Laws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers. That good government calls for the condemnation of such acts as are prohibited by the ordinance ought not to be questioned. The subject is pre-eminently one for local municipal regulation.' *St. Louis* v. *Schoenbusch*, 95 Mo. 618, 8 S. W. 791. (30 App. D. C. at page 522)

In the foregoing pages we have reviewed the important Court decisions dealing with or bearing upon the question

of what enactments of the Legislative Assembly of the District of Columbia created by Congress in the Act of 1871 are properly classed as legislation, and therefore beyond the power of Congress to delegate to the Assembly. From our examination of them, we consider it clear that the Acts of the Assembly of 1872 and 1873 involved in the case at bar are attempts to legislate, and therefore unconstitutional and void.

In the matter of legislation for the District of Columbia Article 1, Section 8, Clause 17 of the Constitution is to be taken literally. Its language is "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. That language cannot be tortured into anything else. The only way to empower a Legislative Body in and for the District of Columbia to enact general legislation is to amend the Constitution and provide clearly therefor.

As Senator Johnston of South Carolina said in debate on a so-called "Home Rule" Bill in the Senate on January 15, 1952:

> The distinction recognized and running through all these cases, though not clearly or specifically defined, yet applied in each case, is very specific, namely, that the Congress may not delegate its exclusive right of legislation and that it can only delegate such power as a State legislature delegates it to municipal corporations to enact strictly local municipal regulations or city ordinances. The dividing line is always left open for judicial construction and final determination of what may be general legislation and what may be a local regulation. (Congressional Record, Daily Edition of January 15, 1952, p. 184, column 3)

The Senator, before making the above quoted statement, had read to the Senate the pertinent parts of many of the decisions which we have reviewed in the preceding pages of this Brief.

We agree with the Senator.

The enactments of the Assembly of 1872 and 1873 were not municipal ordinances—they were general legislation.

They undertook to say what kind of sale a citizen could make of his property, that is to whom he could sell it, and prescribe a fine and forfeiture of his license if he refused to sell to a person of a certain class specified in the enactments. Thus, they limited the use of his property in the exercise of his lawful business. That is not a municipal ordinance. The citizen restaurant proprietor, before these enactments, was free as had been all restaurant owners from the time such establishments were first set up in this country and in Europe to choose his customers and withhold his goods (food, drink, and service) from any person with whom he did not choose to deal. He was free to contract or not to contract. *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); Beale Innkeepers and Hotels, 1906, §§ 15, 35, 53, 61, 301; Williston, Contracts (Rev. Ed. v. 4, § 1066, pp. 2964, 2965); 43 C. J. S. Innkeepers, § 2, p. 1136.

These enactments undertook to take away from him that right of freedom of contract and to brand him as a violator of the law if he did not comply therewith. That is not a municipal ordinance or a police regulation. It is not within the description of the proper subject matter of a municipal ordinance, as stated by McQuillin:

> ... to the promotion or protection of the public morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health which are the ordinary subjects of municipal regulation. (Municipal Corporations, 3rd ed., v. 7 § 24.198, p. 15.)

The enactments of 1872 and 1873 are legislation, as shown in the decisions of the Courts which have considered these enactments, namely, the Supreme Court of the United States, the Supreme Court of the District of Columbia sitting in General Term, and the Court of Appeals of the Dis-

trict of Columbia. And now, in the instant case, the same view is taken by the Municipal Court of the District of Columbia and affirmed by the United States Court of Appeals for the District of Columbia Circuit.

The Attorney General (Brf. p. 26) and the Corporation Counsel (Brf. Sec, 1) have attempted to uphold the power of Congress to delegate to the Legislative Assembly of the District of Columbia authority to enact general legislation by classing the District of Columbia with the Federal Territories and applying to both alike the decisions of this Court, which sustain the power of Congress to delegate such authority to the Territorial Legislatures. The provisions of the Constitution do not justify this contention.

The power of Congress over the District of Columbia is in Article I, Section 8, Clause 17 of the Constitution. The power of Congress over the Territories is not derived from that source. It is contained in Article IV, Section 3, Paragraph 2, which reads as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

It seems appropriate here to take cognizance of some expressions on this subject made in the Congress itself.

Senator Johnston in the debate on the so-called Home Rule Bill, January 14, 1952, drew the distinction plainly. After quoting the above provision as to the Territories, he said:

> It has been argued * * * that our power to legislate for the District of Columbia is similar to the power we possess with respect to our Territories. However, that argument is fallacious, and the contentions in support of it are groundless. Why? The powers we possess are derived from different clauses of the Con-

stitution and from different language employed in that instrument. * * *

No such general power in language so specific is contained in the constitutional authority of Congress for the passage of legislation for the District, because that power is "exclusive." Exclusive to whom? Exclusive to the Congress. * * * I hold that the Congress has no power to delegate this constitutional function to a council in the District of Columbia, regardless of the way that council may be chosen. The District of Columbia Committee of the Senate and the District of Columbia Committee of the House of Representatives, or either of them, could not be invested with power by the Congress to sit alone as a local legislature for the District of Columbia. I can more easily reach the conclusion that such a position is justified than I can come to the conclusion that the Congress has the power to divest itself of its constitutional function, however tedious, however—some may say—"burdensome," however trivial the consequences of such a so-called burden may be. (Congressional Record, Daily edition of January 14, 1952, page 133, columns 1 and 2)

On this subject it is clear that the constitutional powers of Congress with respect to the Territories and those with respect to the District of Columbia are entirely separate and distinct, and decisions and arguments sustaining the power of Congress to delegate the power of legislation in the Territories to the Legislatures of the same have no bearing upon the question of the power of Congress to delegate to a Municipal Council or Assembly in the District of Columbia authority to enact general legislation for the District.

II.

HE ENACTMENTS OF THE LEGISLATIVE ASSEMBLY OF 1872 AND 1873, BEING OF THE CHARACTER OF GENERAL LEGISLATION, WERE REPEALED BY THE DISTRICT OF COLUMBIA CODE OF 1901, ACT OF MARCH 3, 1901, 31 STAT. 1189.

Section 1 of the Code of 1901 provided that:

> The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

There was no specific reference in that section to the nactments of the Legislative Assembly, but Section 1636 f the Code provided:

> All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except: * * *

Of eight exceptions only the third and fifth are pertinent ere. The third exception designated:

> Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.

The enactments of 1872 and 1873 were not saved by that exception, because they were not in the nature of police regulations and did not relate solely to municipal affairs; nor are they saved by the other provisions of this third exception.

The fifth exception only saved from repeal:

> All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both.

In the light of the many Court decisions which we have quoted under Point 1 of this Brief, we believe it is clear that the Acts of the Assembly of 1872 and 1873 were not police regulations but were intended by the Assembly to be legislation; neither were they "Acts relating to municipal affairs only".

The Acts of the Assembly of 1872 and 1873 provided that upon conviction of the offenses defined therein a restaurant keeper shall be fined $100.00 *and forfeit his, her or their license.* These provisions for forfeiture of the restaurant keeper's license are not remedial, but are clearly in the nature of a penalty and it follows that the enactments were not saved by the fifth exception, which saved only "all penal statutes authorizing punishment *by fine only or by imprisonment not exceeding one year or both.*"

Chief Judge Stephens, in Part II of his opinion, after reviewing the hereinabove quoted provisions of the District of Columbia Code of 1901, in which he reached the conclusion that the enactments of the Legislative Assembly of 1872 and 1873 were repealed by that Code, closed his discussion of the point in the following language:

> We think it clear that the license forfeiture provisions of the enactments of 1872 and 1873 are in the nature of penalties. The 1872 enactment makes violation a misdemeanor; the 1873 enactment provides for enforcement by information filed in the Police Court of the District of Columbia, subject to appeal to the Criminal Court of the District in the same manner as provided for the enforcement "of the District fines and penalties

under ordinances and law." The license forfeiture provisions are an integral part of those sanctions. (R. 27-28)

Judge Prettyman joined with Judge Stephens on this point, and added, with reference to the enactments of the Assembly of 1872 and 1873, they "in any event were repealed by the 1901 Code."

The conclusions thus arrived at by Chief Judge Stephens and the three associate Judges concurring therein, and by Judge Prettyman, are so clearly correct, in our opinion, that no further discussion of the same by counsel submitting this brief is deemed necessary in this title.

III.

THE ENACTMENTS OF 1872 AND 1873 WERE ABANDONED AND BY NON-USER WERE REPEALED.

An agreed statement of facts was filed in the Municipal Court containing the following:

> There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; that upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in nolle pross; that all four such prosecutions were in the year 1872 and that there have been no further attempted prosecutions under the 1872 Act since that year.
>
> That there is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act. (R. 18)

The 1873 enactment required the filing with the "Register of said District" of "a printed copy of the usual or common price or prices of articles or things kept for sale by him . . . which shall be filed by the Register . . . and in a failure of any proprietor . . . to transmit the copy aforesaid, the

said Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him." The "agreed statement of facts" contained the following:

> That the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor (sic) of the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands were ever made upon local restaurants so to file by the Assessor (sic) or other municipal officer. (R. 18)

The four Judges who united in the first of principal opinion of the Court below, considered these agreed facts and the contention of the Thompson Company that the failure of the Municipal authorities to enforce the Assembly Enactments of 1872 and 1873 constitutes an administrative interpretation that the enactments were not in force and effect and had been repealed by this "long course of administrative interpretation or by obsolescence", and said that the enactments having lain unenforced for 78 years the decision of the municipal authorities to enforce them now was in effect a decision legislative in character, which were better left to the Congress. They then reasserted their conclusions and the concurring conclusion of Judge Prettyman and announced the judgment of the Court in the following language:

> In accordance with the conclusions we reach that the enactments in question in the instant case were not within the power of the Legislative Assembly and that they were repealed, and in view of Circuit Judge Prettyman's view expressed in his separate opinion that if the enactments were general legislation they were invalid when enacted and were repealed, that if they were municipal ordinances regulatory of licensed businesses they are now unenforceable:
>
> The Judgment of the Municipal Court of Appeals as to the first count of the information is affirmed,

> and as to the second, third and fourth counts of the information is reversed. (R. 88, 89)

Judge Prettyman first stated that if the enactments constituted legislation they were invalid when enacted by the Legislative Assembly, being beyond the power permitted a municipal body in the District of Columbia by the Constitution; and furthermore, even if valid when enacted, they were repealed by the 1901 Code.

He then addressed himself to the view of the four dissenting Judges, holding that the enactments are regulatory municipal ordinances. He said, in effect, that considering the enactments in this light they are not statutes but are merely regulatory ordinances; acts of an official body having power to repeal or abandon them, and on this point of abandonment said:

> It seems to me that a regulatory condition imposed upon a business license, originally prescribed by a municipal licensing authority in 1872 and 1873 but neither mentioned again nor enforced for a period of 75 years, despite the interim promulgation of apparently complete regulations and the issuance of thousands of licenses during that period, must be deemed by the courts to have been abandoned by the licensing authority.
>
> No prosecution under these enactments has been attempted since 1872. No mention of them has been made by any official since 1873. * * * Congress has passed licensing acts several times since 1873, general acts in 1902[1] and 1932[2], and an Act giving the Commissioners power to prescribe regulations for the sale of alcoholic beverages, an important part of many restaurant businesses, under licenses.[3] The latter con-

[1] Act of July 1, 1902, 32 STAT. 622; as to "victualers . . . or eating houses, by whatsoever name designated," see 32 STAT. 625, D. C. Code § 20-887 (1929).

[2] Act of July 1, 1932, 47 STAT. 550; as to restaurants see 47 STAT. 554, D. C. CODE § 47-2327 (1940); as to regulations see 47 STAT. 563, D. C. CODE § 47-2345 (1940).

[3] Act of Jan. 24, 1934, 48 STAT. 322, D. C. CODE § 25-107 (1940).

tained many regulatory provisions and authorized the Commissioners to prescribe others. The enactments of 1872 and 1873 applied to barrooms as well as to restaurants. Extended regulations for the operation of restaurants have been promulgated at least once by the Commissioners; in 1942 the Commissioners published an order which began: "That for the purpose of regulating the establishment, maintenance and operation of restaurants, delicatessens and catering establishments in the District of Columbia, the following regulations are hereby adopted: . . ." In none of the statutes or regulations[8] adopted since 1873 have the regulations with which we are here concerned been mentioned or referred to . . . (R. 90, 91)

Judge Prettyman further said:

Since 1878 the Board of Commissioners has been the governing body of the District of Columbia,[4] which is a municipal corporation.[5] They have had the power both to make[6] and to enforce[7] municipal regulations and generally to exercise all the usual powers of a municipal corporation.[8] Theirs have been the powers of local ordinance-making and of law enforcement.[9] They could repeal what they could enact. Thus the failure to restate and to enforce the 1872-73 conditions was by an official body which had power to do just that. Executive disuse of a legislative enactment is not involved. What is involved is disuse by a licensing authority of its own regulations. (R. 92)

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[4] 20 Stat. 103 (1878), as amended, D. C. Code § .1-201 (1951).

[5] Rev. Stat. D. C. § .2 (1874), 18 Stat. part 2, § .2, D. C. Code § .1-102 (1951).

[6] 27 Stat. 394 (1892), D. C. Code § .1-226 (1951). Since 1902 they have had specific power to require licenses for businesses or callings. 32 Stat. 622 (1902), as amended, D. C. Code § .47-2344 (1951).

[7] Rev. Stat. D. C. § .3 (1874), 18 Stat. part 2, § .3, 18 Stat. 116 (1874), 20 Stat. 103 (1878), D. C. Code § .1-218 (1951).

[8] *Supra*, note 5.

[9] Railroad Co. v. District of Columbia, 10 App. D. C. 111, 127 (1897).

We agree with Judge Prettyman that 75 years of disuse of a licensing regulation by the licensing authorities of the District of Columbia amounts to abandonment of the same and, if the Court should conclude that the enactments of the Assembly of 1872 and 1873 were mere licensing regulations, then clearly they have been abandoned and repealed by the licensing authority, namely, the Board of Commissioners of the District of Columbia.

Judge Prettyman was quite familiar with the police regulations and licensing laws of the District of Columbia, their origin, nature, application and the process of enforcement thereof, having been Corporation Counsel of the District of Columbia from 1934 to 1936 and in charge of enforcing all such regulations.

When the Commissioners published their Order of 1942[10] regulating the maintenance and operation of restaurants in the District of Columbia, as cited by Judge Prettyman, their failure to mention the provisions of the enactments of 1872 and 1873 constituted, we believe, repeal of those enactments by implication. They presumably were aware, in their official capacity, of the existence of the earlier regulatory provisions. Failure of the Commissioners expressly to include them, or their equivalent, in the new regulations necessarily indicates a conscious intention to eliminate them.

Judge Prettyman continued and considered whether the enactments in question were legislation and said:

> The only question presented by the present case within the scope of judicial power is the simple question whether these 1872-73 enactments of the Legislative Assembly are presently enforceable against this appellant in a criminal proceeding with its mandatory license forfeiture upon conviction. (R. 97)

He recited various police regulations and municipal ordinances passed by the District Commissioners and

[10] Officially published in Washington Times Herald, April 2, 1942

pointed out that those were regulations which did not impose conditions upon a license but were police regulations imposed upon everybody and that no forfeiture of license is a prescribed penalty for their violation and then concluded:

> But a regulation imposed upon a designated business which is operated under a license, and upon such a business only, for violation of which regulation forfeiture of the license is decreed, is a condition upon operation under the license; call it what we will. (R. 98)

Judge Prettyman concluded in the following language:

> I concur in the judgment announced by Chief Judge Stephens. But I think it unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances. The same ultimate result—that they are presently unenforceable—follows in either event. If they were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority which originally adopted them. (R. 99)

We believe, and urge the Court to find, that the enactments of the Legislative Assembly of 1872 and 1873 in question here were attempts at general legislation which only Congress could enact and had the power to enact, and which power it could not delegate to such a municipal legislative body as the Assembly, or that they were municipal licensing regulations, and were repealed by the District of Columbia Code of 1901; or that they were abandoned and by non-user were repealed.

The history of issuance of business licenses, including those for restaurants, throughout 75 or more years, reflects clearly the community disuse by common consent, both official and popular, of the principles embodied in this prosecution.

The now sudden and unexpected enforcement of such regulations upon the business community of the Nation's Capital bids fair to disrupt a substantial segment of the economic community which is the operating substance of the City of Washington.

When the license to the restaurant involved in this case was issued to it, the words contained in the license and the language in the license laws embodied in the District of Columbia Code and in the regulations pursuant thereto, promulgated by the Commissioners of the District of Columbia carried no reference, either specific or by implication, to any previously existing license conditions enacted three-fourths of a century before by a Municipal Assembly, which ceased to exist three years after its birth. To import them into that license now is not consistent with our Constitutional system of government.

This cause presents a question as to whether an enactment of a "Legislative Assembly," brought about by conditions existing in a loosely organized, incompetent municipality which came into discredit almost immediately after it was created, and was ended by Congress, its creator, as soon as its unsatisfactory nature and operations definitely developed, can now, three-fourths of a century later, be resurrected and attached purely by implication to an ordinary business license.

CONCLUSION

To summarize, the real issue before the Court in this case is whether the dead hand of long ago, is now, more than 75 years later, to be revitalized and laid upon an economy of a modern metropolitan community of international proportions and importance.

The so-called legislation, the center of this controversy, is shown herein to have been beyond the power of the Legislative Assembly which purported to create it, whether through authority to adopt general legislation or to exe-

cute powers of local municipal regulation. Indeed, it has been demonstrated that the enactments in question could not, and such enactments cannot now, be legalized without specific amendment to the Constitution.

Moreover, as we have shown, even if the foregoing views be considered untenable, we have demonstrated that the enactments in question were repealed by omission when the Congress enacted and the President signed the Act of March 3, 1901, creating a Code of Law for the District of Columbia, without saving exceptions as to them. Finally, even if the Court should brush aside all of these tangible elements, it remains inescapable that the enactments of 1872 and 1873 were, through non-user for 75 years, abandoned and, thereby repealed.

Convincing and concrete evidence of such abandonment and continuance thereof, is presented in the order of 1942 issued by the Commissioners of the District of Columbia to regulate the establishment, maintenance and operation of restaurants, wherein the aforementioned enactments of 1872 and 1873 were in nowise referred to, even by implication.

Reimposition now by judicial fiat of this long-dead regulatory legislation, whether through the means sought herein or otherwise, without due legislative process would, we respectfully submit, constitute an unwarranted blow to the business community of the Nation's Capital.

Respectfully submitted,

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